FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER
875 GREEN TREE ROAD, SUITE 290
PITTSBURGH, PA 15220
TELEPHONE: (412)920-7240
FAX:(412)928-8689

May 23, 2011

INDEPENDENCE COAL COMPANY, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	Docket No. WEVA 2011-402-R
	:	Citation No. 4900014; 11/10/2010
v.	:	
	:	Docket No. WEVA 2011-403-R
SECRETARY OF LABOR,	:	Order No. 4900015; 11/10/2010
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Mine: Justice #1 Mine
Respondent	:	Mine ID: 46-07273
	:	
INMAN ENERGY CORPORATION,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEVA 2011-398-R
v.	:	Citation No. 490011; 11/09/2010
	:	
SECRETARY OF LABOR,	:	Docket No. WEVA 2011-399-R
MINE SAFETY AND HEALTH	:	Order No. 4900012; 11/09/2010
ADMINISTRATION, (MSHA),	:	
Respondent	:	Mine: Randolph Mine
	:	Mine ID: 46-09244
	:	
PROCESS ENERGY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. KENT 2011-255-R
v.	:	Citation No. 8257128; 11/18/2010
	:	
SECRETARY OF LABOR,	:	Docket No. KENT 2011-256-R
MINE SAFETY AND HEALTH	:	Order No. 8257129; 11/18/2010
ADMINISTRATION, (MSHA),	:	
Respondent	:	Mine: Mine No. 1
	:	Mine ID: 15-19097
SPARTAN MINING COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEVA 2011-540-R
v.	:	Citation No. 7281434; 11/30/2010
	:	
SECRETARY OF LABOR,	:	Docket No. WEVA 2011-541-R

MINE SAFETY AND HEALTH, ADMINISTRATION, (MSHA),	:	Order No. 7281435; 11/30/2010
Respondent	:	Mine: Road Fork #5
	:	Mine ID: 46-01544
ROAD FORK DEVELOPMENT CO.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. KENT 2011-305-R
v.	:	Citation No. 8257134; 12/01/2010
	:	
SECRETARY OF LABOR,	:	Docket No. KENT 2011-306-R
MINE SAFETY AND HEALTH	:	Order No. 8257135; 12/01/2010
ADMINISTRATION (MSHA),	:	
Respondent	:	Mine: Love Branch South
	:	Mine ID: 15-19270
KNOX CREEK COAL CORPORATION,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. VA 2011-386-R
v.	:	Citation No. 8185763; 04/21/2011
	:	
SECRETARY OF LABOR,	:	Docket No. VA 2011-387-R
MINE SAFETY AND HEALTH	:	Order No. 8185768; 04/21/2011
ADMINISTRATION (MSHA),	:	
Respondent	:	Mine: Coal Creek Prep Plant
	:	Mine ID: 44-05236

DECISION

Appearances: Alexander Macia, Esq. & Mark E. Heath, Esq., Spilman, Thomas, & Battle, PLLC, Charleston, West Virginia for Massey Energy Company

Samuel Charles Lord, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for the Secretary of Labor

Before: Judge Andrews

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 *et seq*. ("the Act").

Notices of Contest were initially filed by the Contestants on November 15 and 16, 2010. Although the notices informally requested an expedited hearing, separate formal motions for expedited proceedings under section 2700.52 of the Commission Rules were also filed on November 15 and 22, 2010. The motions were granted on November 24, 2010.

The Order of November 24, 2010, also consolidated Docket Nos. WEVA 2011-402R, 403R, 398R, 399R, and KENT 2011-255R, 256R, involving mines controlled by Massey Energy Company ("Massey"). Docket Nos. WEVA 2011-540R, 541R and KENT 2011-305R, 306R were not formally consolidated at that time; however, the Respondents were present by counsel at hearing.

Although not present at the hearing, Knox Creek Coal Corporation entered its Notice of Contest and filed a Motion to Consolidate Docket Nos. WEVA 2011-386R and 387R with the aforementioned dockets. As such, it was assigned to the undersigned on April 26, 2011.

By Order dated May 5, 2011, all dockets were formally consolidated.[1]

PRELIMINARY MATTERS

The parties reported joint stipulations at the hearing, cited for the record, and summarized as follows:

1. Process, Inman, and Independence were, during all relevant times herein, the operators of coal mines located in Pike County, Kentucky, Boone County, West Virginia, and Boone County, West Virginia, respectively.
2. The Contestants are subject to the provisions of the Mine Act.
3. Process received a citation under § 104(a) of the Mine Act on November 18, 2010, for an alleged failure to permit inspection of certain records in response to a request by an authorized representative of the Secretary of Labor, pursuant to 30 C.F.R. § 50.41. A subsequent citation was issued under § 104(b).
4. Inman received a citation under § 104(a) of the Mine Act on November 9, 2010, for an alleged failure to permit inspection of certain records in response to a request by an authorized representative of the Secretary of Labor, pursuant to 30 C.F.R. § 50.41. A subsequent citation was issued under § 104(b).
5. Independence received a citation under § 104(a) of the Mine Act on November 10, 2010, for an alleged failure to permit inspection of certain records in response to a request by an authorized representative of the Secretary of Labor pursuant to 30 C.F.R. § 50.41. A subsequent citation was issued under § 104(b).
6. The citations and orders were issued by an authorized representative of the Secretary to an agent of Process, an agent of Inman, and an agent of Independence.
7. That the following various pieces of communications between the Secretary and Process, Inman, and Independence were authentic, but not the truth of the matters asserted therein:
    a. The records requests that occurred on October 8, October 25, and October 27, 2010.
    b. The October 28, 2010 letter from Charlie Lord to M. Shane Harvey.
    c. The November 9, 2010 and November 10, 2010 letters from Mark Heath and Alex Marcia to Charlie Lord and Robert Hardman, respectively.

[1] Additional Part 50 audit cases involving mines controlled by Peabody Energy were heard in Jeffersonville, Indiana on December 14, 2010. Separate hearings were held due to the distant locations of these groups of mines, but for all major purposes, counsel treated all of the contests as one large, related case.

8. The records at issue are the medical records requested in the letters of October 25 and October 27, 2010.

BACKGROUND

In October 2010, the Mine Safety and Health Administration ("MSHA") began a nationwide initiative to conduct thirty-nine (39) compliance audits under the authority of 30 C.F.R Part 50. Six subsidiary mines of Massey are a part of this initiative: the Justice #1 mine of the Independence Coal Company, Inc. ("Justice"); the Randolph Mine of Inman Energy Corporation ("Randolph"); Mine #1 of Process Energy ("Process"); the Road Fork #51 mine of the Spartan Mining Company ("Road Fork"); the Love Branch South mine of the Road Fork Development Company ("Love Branch"); and the Coal Creek Prep Plant of the Knox Creek Coal Corporation ("Coal Creek").

The initial audit request was presented by letter dated October 8, 2010, addressed to Inman Energy. Ex. J-A. Mr. M. Shane Harvey, Vice President and General Counsel of Massey Energy Company responded by letter dated October 13, 2010, that Forms 7000-1, 7000-2, and the number of employees for each quarter would be made available for the audit team's review; however, the payroll records and timesheets (request #3), and the medical records (request #5) would not be made available.

The superseding Part 50 audit request was provided to Mr. Harvey by letter of October 25, 2010. Ex J-C, J-D. The superseding audit request was also sent to Independence Coal and Process Energy on October 27, 2010. Ex. J-E, J-H. Somewhat later, in November and December, 2010, and April 2011, Spartan Mining, Road Fork Development, and Knox Creek Coal also received the respective audit requests.

The superseding audit request provided to each mine is, in pertinent part, as follows:

> The Federal Mine Safety and Health Administration (MSHA) is conducting an audit to determine your mine's compliance with the injury and illness reporting regulations in 30 Code of Federal Regulations (CFR) Part 50. Pursuant to 30 CFR §50.41, MSHA is requesting certain records that are considered to be relevant and necessary to complete its audit.
>
> Please have the following information and documentation available for review by …. The documents should cover the period beginning July 1, 2009 through June 30, 2010.
>
> 1. All MSHA Form 7000-1 Accident Reports
>
> 2. All quarterly MSHA Form 7000-2 Employment and Production Reports
>
> 3. All payroll records and time sheets for all individuals working at your mine for the covered time period

4. The number of employees working at the mine for each quarter

5. All medical records, doctor's slips, worker compensation filings, sick leave requests or reports, drug testing documents, emergency medical transportation records, and medical claims forms in your possession relating to accidents, injuries, or illnesses that occurred at the mine or may have resulted from work at the mine for all individuals working at your mine for the period of July 1, 2009 through June 30, 2010.

"In your possession" means within your mine's possession or within the control, custody, or possession of another entity or person from whom you have authority to obtain the required records. If any of the required records are in the exclusive possession of any other entity or person from who you do not have authority to obtain the required records, you must so certify and identify the entity or person who has exclusive possession. Ex. J-C, J-D

Counsel for Massey responded to the audit requests at the Inman and Independence mines expressing concerns about the medical records request. Ex J-F, J-G.

Since the content of the superseding audit request letters is essentially the same, they will be referred to as the Uniform Audit Request ("UAR").

Photocopies of forms 7000-1 and 7000-2 are of record at Exhibits A and B of the Secretary's Pre-Hearing Bench Memorandum.

The audit letters, citations, and orders for each of the six mines are dated beginning in October 2010 and ending in April 2011. Rather than setting forth at length all of the particulars of each citation and order, the following is a brief summary of the general circumstances:

-Each mine received a UAR.
-All mines provided the 7000-1 and 7000-2 forms and the number of employees.
-Not all of the mines provided timesheet data at the time of the audit.
-Personnel records and medical information were not provided by any mine.
-Section 104(a) citations were issued to each mine upon refusal to disclose.
-Section 104(b) orders were issued to each mine upon continued refusal.

Reported at the time of the hearing was the policy of Massey to provide timesheet information or a Lawson Report (described as a big summary sheet) for Part 50 audits. Tr. 91, 92, 99, 100, 149, 159. The timesheet information is essentially a record of the on or off duty time of each employee.

It should also be noted that the citations and orders issued to Road Fork and Love Branch cited Section 103(h) of the Act rather than Section 50.41 of the regulations. However, in the condition or practice narrative of each of these citations, 30 C.F.R. Part 50 was correctly referenced.

LAW AND REGULATIONS

Section 103(a) of the Act states in pertinent part:

> Authorized representatives of the Secretary…shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards,…and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order or decision issues under this title or other requirements of this Act. 30 U.S.C §813(a).

Section 103(h) of the Act states in pertinent part:

> In addition to such records as are specifically required by this Act, every operator of a coal or other mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary ... may reasonably require from time to time to enable him to perform his functions under this Act. The Secretary ... is authorized to compile, analyze, and publish, either in summary or detailed form, such reports or information so obtained. 30 U.S.C. § 813(h)

Section 103(e) of the Act states in pertinent part:

> Any information obtained by the Secretary ... under this Act shall be obtained in such a manner as not to impose an unreasonable burden upon operators, especially those operating small businesses, consistent with the underlying purposes of this Act. Unnecessary duplication of effort in obtaining information shall be reduced to the maximum extent feasible. 30 U.S.C. §813(e)

The purpose and scope of 30 C.F.R. Part 50 is found in section 50.1 and states:

> This part 50 implements sections 103(e) and 111 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq., and sections 4 and 13 of the Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. 721 et seq., and applies to operators of coal, metal, and nonmetallic mines. It requires operators to immediately notify the Mine Safety and Health Administration (MSHA) of accidents, requires operators to investigate accidents, and restricts disturbance of accident related areas. This part also requires operators to file reports pertaining to accidents, occupational injuries and occupational illnesses, as well as employment and coal production data, with MSHA, and requires operators to maintain copies of reports at relevant mine offices. The purpose of this part is to implement MSHA's authority to investigate, and to obtain and utilize information pertaining to, accidents, injuries, and illnesses occurring or originating in mines. In utilizing

information received under part 50, MSHA will develop rates of injury occurrence (incident rates or IR), on the basis of 200,000 hours of employee exposure (equivalent to 100 employees working 2,000 hours per year). The incidence rate for a particular injury category will be based on the formula:

IR = (number of cases x 200,000) divided by hours of employee exposure.
MSHA will develop data respecting injury severity using days away from work or days of restricted work activity and the 200,000 hour base as criteria. The severity measure (SM) for a particular injury category will be based on the formula:

SM = (sum of days x 200,000) divided by hours of employee exposure.

Section 50.41 states:

Upon request by MSHA, an operator shall allow MSHA to inspect and copy information related to an accident, injury or illnesses which MSHA considers relevant and necessary to verify a report of investigation required by 50.11 of this part or relevant and necessary to a determination of compliance with the reporting requirements of this part.

The preamble to the proposed rule at Section 50.41 sets forth the purpose of the regulation and explains what MSHA (then the Mining Enforcement and Safety Administration ("MESA")) may request and the importance of cooperation with these requests:

Section 50.41 requires operators to allow MESA to inspect or copy any information the agency thinks may be relevant and necessary for verification of reports or for determination of compliance with Part 50. In effect, it allows MESA to copy company medical records, employment records, and other company information.

MESA believes that this provision is necessary if it is to be able to develop epidemiologic data essential to development of effective health standards. It is also necessary if MESA is to be able to discover instances of intentional violation of statutory or regulatory requirements. It will allow MESA to control the data flow, rather than depend upon operator filtered records. 42 Fed. Reg. 55569 (1977).

The preamble to the final rule addressed privacy concerns and the need for verification:

The patient-physician confidentiality privilege is not absolute. Where disclosure of patient data is related to a valid purpose, disclosure has been held not to be violative of privacy rights. It is questionable whether employers have standing to assert employees' privacy rights and significant that no miner or representative of miners has objected to §50.41.

> Without inspection of records beyond those required to be kept it is impossible to verify the required records. The Secretary's power to acquire information related to his functions under the Coal Act and the Metal Act is not limited to any particular records. Section 111 (b) of the Coal Act and § 13 of the Metal Act explicitly authorize analysis of other information related to his functions, and only the Secretary, subsequent to inspection and copying, can determine relevance…42 Fed. Reg. 65535 (1977).

ARGUMENTS

Contestants argue, first, that the Secretary does not have the right to inspect records possessed by an operator that are not required to be maintained by the Act without obtaining a warrant. This proposition, founded in *Sewell Coal Co*., 1 FMSHRC 864 (1979)(ALJ), has stood without being overturned for nearly thirty-two (32) years and cannot be overlooked. Further, the legislative history of the Act itself expresses that, while the Secretary's powers of inspection are broad, those powers should also be limited to prevent unnecessary burden on operators. Second, they argue that the Secretary must use her rulemaking authority to obtain the information requested. As such, this request is ad hoc rulemaking that violates the standard notice and comment rulemaking requirements. Third, they argue that MSHA's request to inspect private medical records of the employees is not authorized under the provisions of the Health Insurance Portability and Accountability Act ("HIPAA"). MSHA could verify reporting accuracy with much less information and, therefore, has not met the standard of requesting only that information that is the "minimum necessary" to accomplish the intended purpose. Moreover, Contestants argue that MSHA's procedures are insufficient to ensure the nondisclosure of private employee information. Their final contention is that, due to the foregoing reasons, the citations and orders issued to the mines should be vacated.

The Secretary argues, first, that Part 50's role in advancing miner safety and health cannot be overstated, as it identifies the aspects of mining that require intensified attention with respect to health and safety regulation. The under-reporting of accidents undermines this role by diverting MSHA attention from important areas of risk. Second, the information sought is relevant and necessary to verify accurate compliance with the regulations. Third, she argues that the Act, by its plain language, permits MSHA to obtain records that are relevant and necessary even when the statute and regulations do not require such records to be maintained. The Secretary asserts that the inclusion of "*[i]n addition to such records*" is evidence of the Act's intent. (Emphasis Added). Finally, the Secretary argues that, as a public health agency, MSHA may obtain the records that have been requested without violating the medical privacy rights of mine employees. Moreover, she contends that MSHA has protective procedures that sufficiently protect private employee information from public disclosure.

QUESTIONS PRESENTED

While the issue to be decided is whether the citations and orders written to each of the mines are valid, there are a number of questions for consideration:

-Are the medical, personnel, and timesheet records sought by the UAR relevant and necessary to determine compliance with the reporting requirements of the regulations?

-Does the Secretary have the authority to request medical and employment records and other company information pursuant to an audit request under the pertinent statutes and Part 50 of the regulations?

-Does the UAR impose an unreasonable burden upon the operator?

DISCUSSION

Reporting accidents, injuries, and illnesses occurring at a mine is a well-known and long-established requirement under the Act and the Part 50 regulations. 30 C.F.R. §50.20. Definitions and instructions for reporting are provided in Sections 50.2(e),(f) and 50.20-3. The 7000-1 form is to be mailed to MSHA within ten (10) days of the accident, injury, or illness. MSHA then uses this information, in combination with the 7000-2 form, which is a quarterly calculation of the hours worked by each employee at the mine, to determine the mine's incidence rate ("IR") and severity measure ("SM"). These numerical indicators quantify a mine's overall safety record and may be used to objectively view a particular mine's record in comparison to national averages.

The IR for a particular injury category is calculated by multiplying the number of reportable incidents and the coefficient 200,000 and dividing that number by the total hours of employee exposure. The SM for a particular injury category is calculated by multiplying the total number of missed and restricted duty workdays and the coefficient 200,000 and dividing that number by the total hours of employee exposure. The incidence rate is important in that it gives an overall picture of the safety record of the operator. *Energy West Mining Company*, 15 FMSHRC 587, 591 (Apr. 1993). Knowing the prevalence of specific types of injuries and their usual severity allows for more efficient allocation of agency resources in developing strategies, not only for enforcement, but also for training with the goal of improving the health and safety of miners.

David Brown is the Safety Director for Independence and Inman Coal Companies. Tr. 86. James Endicott is the Safety Director for Road Fork Development Co. and Sidney Coal Company, which covers Process Energy. Tr. 113. Both men described essentially the same functions. Their responsibilities include keeping basic training records, completing accident reports, and handling federal and state citations. Tr. 87, 113. Although both men are responsible for completing the 7000-1 Form, neither maintains possession of medical records, worker's compensations records, or doctor's or emergency room slips. Tr. 87-88, 114-116. Instead, the Human Resources Department ("HR") maintains all of the aforementioned records in a separate location. Tr. 87-88, 116. At least in Brown's case, he testified that he relies on phone calls from miners, the foremen's investigation and accident reports, and the supervisors' reports to fill out the 7000-1 Forms. Tr. 96. He had only received information from HR on one occasion. Tr. 99.

Steven E. Richards, Human Resources Manager for Independence Coal, testified that he maintains the medical, personnel, and worker's compensation records. Tr. 74-75. This information is kept at a single location, although in separate rooms, and is maintained for "several years," which he implied meant more than ten (10) years. Tr. 77, 83. Although Richards receives the doctor's

slips, he has never filled out a 7000-1 or 7000-2 Form. Tr. 84. Further, he has never experienced a situation in which a safety director has called to ask about a particular miner's absence. Tr. 85. Jeffery Ratliff is the Human Resources Manager for Process Tr. 105. He confirmed that he also maintained workers' compensation, medical, and personnel records for each miner in separate files and stored separately with security measures in place. Tr. 106, 107. Mr. Ratliff was present at the time of the audit request at Process and testified that the medical records had not been provided to MSHA Inspectors. Tr. 110,111.

It is clear from the testimony of Safety Directors Brown and Endicott that information regarding accidents, injuries and illnesses must be provided to them if they are to submit the required reports to MSHA. The flow of this information is generally from the Supervisor or Foreman, but the Safety Department may also receive medical documents, which are turned over to and kept by HR. The Safety Director may follow up with the Supervisor, Foreman or employee to complete the information on the 7000-1 form, but does not have access to the various medical files safeguarded by HR. To the contrary, the time sheets, payroll records, worker compensation records and medical documents of all types are in the exclusive possession and control of HR. Tr. 74-75. While the records are not necessarily "off limits," HR Manager Richards stated that he had never experienced a situation where a Safety Director called to inquire about the absence of a particular miner. Tr. 85. Neither was evidence produced at the hearing to suggest that HR would take the initiative to provide relevant injury time off information to the Safety Department.

Considering the volume of medical information that undoubtedly flows into HR, but not available to the Safety Director, there is at least the potential for relevant events to go unreported. In addition, should the Supervisor, Foreman or employee fail to initiate a report to the Safety Director, it appears likely that an otherwise reportable event would escape the notice (and hence the reporting responsibilities) of the Safety Director. The resulting lack of complete reporting could, of course, be inadvertent or unintentional. But the result is the under-reporting of information needed by MSHA to discharge its duties and responsibilities to compile and report incidence rates and severity measures as well as manage the allocation of agency resources.

Over-reporting would also result in inaccurate information and misallocation of resources. The mine would appear less safe than it actually is, and this could result in increased inspections. However, this would rarely be the concern to be addressed. On the other hand, there would be incentives to under-report injury and illness information to MSHA. Contestants suggest that MSHA has the authority to interview miners. Tr. 17, 18, 61, 93, 94, 149. But such interviews would be prohibitively time consuming and, without 100 percent participation, could fail to verify complete and accurate reporting. This suggestion is also contained in a MSHA handbook, where it is stated that examination and comparison of state workers' compensation records to the MSHA reports (7000-1, 2 forms) may be appropriate. Ex. J-M, Page 43, Metal and Nonmetal General Inspection Procedures Handbook, No. PH09-IV-1 (Oct. 2009).

Peter Joseph Montali, Acting Director of Accountability for MSHA, testified that the same audit request, the UAR, was sent to all of the mines audited, including Process. Tr. 26, 31, 32. All of the mines provided the 7000-series forms, and some timesheet information (request #3). Tr. 27, 28. In the affidavit of record, *See* Secretary's Pre-hearing Bench Memorandum, Ex. D, Mr. Montali reported that he had prior experience with Part 50 requirements. He pointed out that the medical

records requested by the audit are limited to accidents, injuries, and illnesses that occurred at the mine or may have resulted from work at the mine. Also, he clarified that the payroll and time sheet records were only to verify the total number of employees and the total hours worked, as reported on the 7000-2 form. As to the various medical records, including the Worker's Compensation filings, sick leave requests and emergency medical transportation (EMT) records, Mr. Montali provided information to the effect that these are cross-referenced with the 7000-1 forms submitted by the mine to verify proper, complete and accurate reporting of all required information, including severity, treatment, permanent total or partial disability, days away from work, days of restricted work activity, date of return to full duty, or no lost time. The drug-testing documents are limited to tests taken after an accident-causing injury, and the medical claims forms are limited to a determination of whether a particular illness would fit the definition of an "occupational illness". *id*.

It is understood that the Massey policy is to release the timesheet data to the audit team. While this may be adequate to verify information on the 7000-2 form, regarding employee hours worked, this would not suffice to verify accident, injury or illness reporting. As is made clear by the affidavit and testimony of Montali, discussed above, much more information is needed to fully and properly complete the 7000-1 form. Therefore, the medical and personnel information sought by the Secretary is relevant and necessary to cross-reference with forms that were submitted to the agency by the operator. Indeed, without the documents, verification of all of the information listed on each form is not possible, nor would it be possible to discover instances of injuries that were not reported.

It is the operator who possesses the means to insure complete and accurate reporting. Absent an audit of company records, MSHA must rely solely on the information provided by the operator. If the operator does not cooperate in the process, there can be no assurance that the safety and health information compiled by MSHA is correct.

If the total number of reportable incidents are under-reported, a mine, obviously, will appear to be safer than it actually is. If the incidence rate and severity measure are artificially low, an unsafe mine may be able to avoid enhanced MSHA scrutiny. Further, an elevated severity measure is one criterion in the initial screening for establishing a "pattern of significant and substantial violations." 30 C.F.R. 104.2(b)(3). Once this pattern has been established, the mine may be subjected to enhanced penalties and possible forced shutdowns. 30 C.F.R. §104.4. If given the power to solely control the information flow between itself and MSHA, an operator possesses incentives to constrict that flow and under-report incidents at the mine.

The purpose of the Part 50 regulations is to implement MSHA's authority not only to investigate but also to obtain and utilize information pertaining to accidents, injuries or illnesses occurring or originating at mines. 30 C.F.R. §50.1. In order to develop effective health standards, control the data flow, and discover violations, MSHA is allowed to inspect and/or copy any information the agency thinks may be relevant and necessary to determine compliance with reporting requirements. This includes medical records, employment records, and other company records. 42 Fed. Reg. 55569, 65535 (1977), 30 C.F.R. §50.41. Under 50.41, it was intended that MSHA would not depend on operator-filtered records. *Id*. It is pointed out that the 7000-1 and 7000-2 forms <u>are</u> operator-filtered records. Absent all of the documents and information listed in the UAR, there can be no effective, independent verification of the information submitted by the operators to MSHA.

In summary of the above discussion, the undersigned does not consider it to be an overstatement that the complete and accurate reporting of accidents, injuries, and illnesses occurring at mines is critically important to the mission of MSHA to protect the health and safety of miners. "The health, safety and the very lives of coal miners are jeopardized when mandatory health and safety laws are violated." *Youghiogheny and Ohio Coal Company v. Morton*, 364 F.Supp. 45, 50 (1973). From the stated intent in the promulgation of 30 C.F.R. §50.41 it can be found that it is not what the operator considers important to report; rather, it is what MSHA thinks is relevant and necessary to verify reports or determine compliance with Part 50 of the regulations. It follows, then, that the records sought by MSHA are relevant and necessary to verify compliance with all reporting requirements. Testimony confirms that the records are either maintained by the mine or a third party, or stored, for more than 10 years. Tr. 83.

FINDINGS AND CONCLUSIONS

Commission precedent in this area is rare and does not address the specific set of facts in the instant case. In *BHP Copper*, a fall of ground caused the death of one miner and the injury of another. *Id*., 21 FMSHRC 758, 759 (July 1999). While MSHA inspectors were allowed to interview several BHP employees, BHP would not provide the phone number and address for the injured miner who had just been released from the hospital, stating that the information was confidential. *Id*. In denying the contention of the operator, the Commission explained that the Secretary has broad authority under the Act to investigate mine accidents and the operator may not impede that investigation *Id*. at 765-766. The Commission also rejected the argument that the Secretary must seek injunctive relief under Section 108 of the Act. *Id.* at 766.

A second, older Commission case is *Peabody Coal Company*, 6 FMSHRC 183 (Feb. 1984). Here, an inspector was refused access to accident reports because the operator had already filed them with MSHA. *Id*. at 185. Peabody argued that because this inspection was of a "type so random, infrequent, or unpredictable that the appellant, for all practical purposes, had no real expectation that its property would from time to time be inspected by government officials." *Id*. Further, it asserted that, in order for MSHA to inspect, it must obtain a warrant. *Id*. In disagreeing with the operator, the Commission found that a search warrant was not required and since the Act required the operator to maintain the records of accidents for five years there was no realistic expectation of privacy in them. *Id*. at 186.

Although these Commission cases involve conflicts over information contained in the operator's records, this is where the similarities end. No accident has occurred in the instant case; rather, MSHA is conducting an audit. MSHA is requesting documents to verify that no accident, injury or illness has gone unreported, not investigating the facts and circumstances behind such an incident. In this respect, neither *BHP Copper* nor *Peabody* specifically addresses the questions raised by the compliance audit at hand.

The Contestants argue that the decision in *Sewell Coal Company*, 1 FMSHRC 864 (1979)(ALJ) cannot be overlooked. In *Sewell*, an MSHA inspector began an inspection of the foremen's records, accident, injury and illness records and medical and compensation records at the

mine. *Id*. at 865. All of this information was contained in personnel records that contained other data as well. *Id*. After the discovery of two instances of failure to report, the safety manager informed the inspector that he would not be permitted to continue the inspection. In characterizing the inspection, the ALJ maintained that Part 50 does not explicitly authorize the warrantless search of personnel files containing medical and other information that may or may not be related to accidents, injuries, and illnesses that are reportable. *Id*. at 873. Accordingly, the Administrative Law Judge ("ALJ") held that MSHA could not inspect the private personnel files of a mine, in the absence of a valid warrant. *Id*. at 872-873.

However, the instant case can easily be distinguished from *Sewell*. First, the actions of the MSHA inspectors here do not constitute a warrantless search; rather, they are simply requesting that the operator produce certain documents. Unlike in *Sewell*, the inspector would not be rummaging through the file cabinets or files of the operator.[2] The mine operator would search his own files for this information, producing only those records meeting the specifics of the request, thereby limiting the chance that unrelated private information would be released to MSHA.

Moreover, this was not some wholesale demand that would cause the operator great cost and burden to produce. MSHA's request was for documents related only to those accidents, injuries, and illnesses that occurred while working at the mine or as a result of work at the mine. Furthermore, MSHA is only requesting documents that were recorded within the span of one year. The request concerns only employees, not family members, relatives, or others; if non-employee medical or other records are maintained at the mine, they would not be required for the audit. Any medical or EMT records would concern only the employee, and as to drug tests, only those conducted following an accident that caused an injury. *See,* Affidavit of Montali. Since the requested records are maintained for a number of years, compiling the requested records for only one year would not be burdensome.

Third, as an ALJ decision, this case does not have value as precedent. Admittedly, if the facts were so similar that they could barely be distinguished, I may have been persuaded to consider its reasoning. However, for the reasons listed above, I find the facts in the instant case to be so distinct, that *Sewell* does not provide guidance and is not controlling.

In the absence of controlling Commission precedent, we turn to the statutes, regulations and case law for guidance. Initially, we note that the Mine Act and the implementing regulations are to be liberally construed as long as the Secretary's interpretation is reasonable and promotes miner safety. *Hanna Mining Co.,* 3 FMSHRC 2045, 2048 (Sept. 1981); *Secretary of Labor v. Cannelton Industries, Inc.,* 867 F.2d 1432, 1437 (D.C. Cir. 1989)

In *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), the Court explained that when confronted with review of an agency's construction of the statute it administers, a judge must consider two questions. The first is whether Congress has spoken to the issue in question. *Id*. If so, the questions are at an end and the language must be enforced as written. *Id*. If the statute is silent or ambiguous to the issue in question, however, the Court must question whether the agency's answer is a permissible interpretation of the language of the statute. *Id*. In this

[2] In *Peabody*, the Commission similarly distinguished *Sewell* in this manner.

instance, the agency's interpretation must be reasonable, and if so, it will be accorded deference. "…Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer…." *Id.* At 844.

The same analysis applies equally to the language and interpretation of the Secretary's own regulations. *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Utah Power and Light Co.,* 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.,* 15 FMSHRC 1555, 1557 (Aug. 1993); *Cyprus Emerald Resources Corp.,* 20 FMSHRC 790 (Aug. 1998).

I find no need to go beyond the plain language of the statutes and regulations. Section 103 (a)(1)(4) of the Act empowers the Secretary to obtain and utilize information to determine *"...whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act."* (Emphasis added). Section 103(h) of the Act broadens the scope of compliance actions by explicitly stating *"[i]n addition to such records as are specifically required by this Act, every operator of a coal or other mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary…may reasonably require from time to time…."* (Emphasis added). These statutory provisions create a duty on the part of the operator to maintain and provide records to MSHA for the agency to determine compliance with any requirements of the Act. Hence, there would be a legitimate basis for enforcement of reporting requirements even without the Part 50 rules. *American Mining Congress,* 995 F. 2d 1106, 1109 (1993).

The Contestants argue that the records sought are private, and the procedures for safeguarding the information released to MSHA are insufficient. Although no one would argue against the notion that medical and personnel records are of a highly sensitive and personal nature, there are certain important interests of the government that override these concerns. MSHA, a public health agency, does have the authority to obtain information to determine compliance with the above cited statutes, and permission from the employees is not required. *United Steelworkers of America, AFL-CIO-CLC,* 647 F.2d 1189, 1241 (Jan. 1981). The disclosure of private medical information to a public health agency is a reasonable exercise of government responsibility over public welfare where it is related to occupational health and safety and does not violate any rights or liberties protected by the Fourteenth Amendment. *Whalen v. Roe,* 429 U.S. 589, 597, 598, 602. Further, and importantly, it may be concluded that the governmental interest in promoting mine safety far outweighs any interest the mine operators may have in privacy. *Youghiogheny* at 51.

Even if the statutes were considered ambiguous, the Part 50 rules are legislative rules. Their publication in 1977 satisfies the requirement that the rules have general applicability and legal effect. *American Mining Congress,* at 1109, 1110. Entirely consistent with the statutory mandate, the agency promulgated regulations, including 50.41, that also spelled out duties of the operator to cooperate in determinations of compliance, *Id.* at 1110, 1111. Section 50.41 of the regulations allows the Secretary *"to inspect and copy information related to an accident, injury or illnesses which MSHA considers…relevant and necessary to a determination of compliance with the*

reporting requirements of this part." (Emphasis added). Both the statutory and regulatory provisions are clear in their purpose and intent to grant the Secretary authority to request documents that are not specifically required to be kept under the Act. To find otherwise would be to render these passages meaningless.

Further, as set forth and discussed above, the preambles to the controlling regulation, 30 C.F.R. §50.41, are instructive in that MSHA may request the employment, medical and other records of the employer. The Secretary is authorized to inspect records in order to determine reporting compliance. The reasoning is that reliance on the information provided in the required forms by the operator itself would do very little to verify and ensure complete reporting. In order to verify compliance, the Secretary must have some control over the flow of information. The power to acquire information was not limited to any particular records, and only the Secretary, subsequent to inspection and copying, could determine relevance. 42 Fed. Reg. 55569, 65535 (1977). The language of these preambles is persuasive.

The Health Insurance Portability and Accountability Act ("HIPAA") created a national framework for health privacy protection while also protecting the rights of consumers to access their own health information. 45 C.F.R. §160.101. Without suggesting that HIPAA in any way extends the Secretary's authority to request records, it is significant from the standpoint of expectations of privacy that it explicitly exempts "[a] public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability." 40 CFR § 164.512. The preamble to the HIPAA regulations specifically lists MSHA as one of the entities included as a public health authority. 65 Fed. Reg. 82624 (Dec. 28, 2000).

Moreover, and in consideration of the Contestant's concerns regarding the possibility of unauthorized disclosure of private employee information, the safeguards that MSHA utilizes during its Part 50 audits to prevent any further release are adequate. Among the joint exhibits is a memorandum, distributed on December 13, 2010, Tr. 12, outlining procedures for safeguarding personally identifiable medical or other sensitive information. Ex. J-K. The agency has established specific procedures that must be followed when handling the records of an operator's employees. These include special filing procedures, locked storage, limited access, safe transportation methods, and an alert that medical information is ordinarily exempt from Freedom from Information Act (FOIA) disclosure. *Id*. While no procedures are fool-proof, these go a long way to ensuring that information will not be disclosed. Considering the Congressional mandate to the agency, the controlling regulations, and the exemption from HIPAA provisions, there can be no reasonable expectation of privacy in the records sought by MSHA.

Having found that the Secretary does have the authority to request the records at issue in this case, I do not have to rule on the reasonableness of her interpretation of the statutes and regulations. However, given the compelling need to verify reports and determine compliance, I would have found her interpretation reasonable anyway. The request is limited to defined types of documents that are necessary to further her mission to protect the safety and health of miners. She is not requesting a wholesale search of all of the records of the operator, including those that are irrelevant to the goals of the audit.

It follows also from the above discussion, that contrary to the Contestant's arguments, this is not arbitrary, ad hoc rulemaking that violates the standard notice and comment rulemaking requirements. The Secretary has interpreted "in addition to such records" to broaden the document requesting power that She already possessed. She did not create new powers for herself. Her interpretation further defines that this phrase includes employee time sheets, payroll records, medical records and such other documentation requested as relates to work at the mine. The language of the Act lends itself to this interpretation and, thus, the Secretary did not engage in arbitrary, ad hoc rulemaking.

In fact, legislative rulemaking has already been accomplished, in 1977, and there is no need for additional rulemaking. The regulatory scheme under Part 50 is adequate for the purposes of the audit. A reasonable interpretation of the statutory language would establish that documents in addition to those required to be kept under the Act may be requested by the Secretary from time to time as long as they are relevant and necessary. Specific types of documents or information do not need to be named in either the statutes or the regulations. There is no discernible inconsistency between the UAR and either the Act or the Part 50 regulations. The Secretary did not exceed her interpretation authority under *Chevron* analysis.

The Contestants, citing *Sewell*, argue that the audit request amounts to a search of private company records that cannot be conducted absent a valid search warrant. The most obvious deficiency in this argument is that the Secretary is not demanding to rummage around in the files of the operator. To the contrary, She is requesting that the Contestants produce the documents for analysis by MSHA. Moreover, the documents to be produced are limited by both content and time. By its own description, the request is not a wholesale search. Even if the UAR is considered to be a warrantless demand for the production of documents, as distinguished from a warrantless search and/or seizure of company files, it still does not violate the Fourth Amendment. It is authorized by law to verify compliance with the Act and regulations and necessary to further a federal interest, the health and safety of miners. Where Congress has allowed the agency access to the records, with the specific language of Section 103 (h), in a pervasively regulated industry, there cannot be an expectation of privacy. *Donovan v. Dewey*, 452 U.S. 594, 599, 600 (1981).

Finally, the Contestants argue that the Secretary could verify reporting accuracy with much less information. This argument suggests that the audit is unreasonable. I have discussed above, that the audit request is not burdensome. I also find that it is neither overly broad nor unreasonable. The Secretary does not request every documented injury or illness to every miner for a number of years. She is only requesting the documentation of injury, illness, or accident that occurred while working at the mine or as a result of work at the mine. The UAR is for a lawful purpose. It is limited to the span of one year's time. Moreover, the records listed in #3 and #5 of the UAR are maintained at the mine, in HR, or with a known third party. The records needed to verify compliance are clearly described. The undersigned is of the opinion that the Part 50 audit requests <u>are</u> the minimum necessary to verify <u>all</u> of the information submitted to MSHA on the 7000 forms. Therefore, and in light of the significant limitations incorporated into the audit request, it is not overly broad, burdensome or unreasonable.

I find that the Contestant mines failed to fully cooperate in the Part 50 audit and violated 30 C.F.R. §50.41. I further find that Citations 4900014, 4900011, 8257128, 7281434, 8257134 and 8185763 and Orders 4900015, 4900012, 8257129, 7281435, 8257135 and 8185768 issued to the Justice, Randolph, Process, Road Fork and Love Branch mines and Coal Creek Prep Plant, respectively, are valid.

ORDER

The valid Citations and Orders issued to the Contestant mines are **AFFIRMED**.

Kenneth R. Andrews
Administrative Law Judge

Distribution:

Alexander Macia, Esq., Mark E. Heath, Esq., Spilman, Thomas & Battle, PLLC, Spilman Center, 300 Kanawha Boulevard, East, Charleston, WV 25301

Samuel Charles Lord, Esq., Office of the Regional Solicitor, U.S. Department of Labor, 1100 Wilson Blvd, 22nd Floor West, Arlington, VA 22209

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